SUPREME COURT, U. S.

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-188

THE STATE OF TEXAS,
Petitioner

V.

DANIEL LANDRY, A DELINQUENT CHILD,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CIVIL APPEALS FOR

THE NINTH SUPREME JUDICIAL DISTRICT

OF TEXAS, AT BEAUMONT

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INDEX

	Page
Opinion Below.	3
Jurisdiction.	4
Questions Presented	5
Constitutional and Statutory Provisions Involved	7
Statement of Facts	10
Argument and Reasons for Granting the Writ.	15
Conclusion	20
Appendix "A".	1-20
Appendix "B".	1

CASE CITATIONS

	Page
Albrecht v. State	15
Boykin v. Alabama	13
Brady v. United States	13
Brown v. United States	1 17
In Re Gault	12, 18
Kent v. United States	12
McCarthey v. United States	13
Miranda v. Arizona	12
Moreno v. State	18

STATUTORY CITATIONS

	Page
5th Amendment	7
14th Amendment	8
28 U.S.C., § 1257 (3)	4
Federal Criminal Rule 11	7, 15 16, 17
Texas Code of Criminal Procedure Art. 27.14	8
Vernon's Annotated Texas Statutes Art. 2338-1	5

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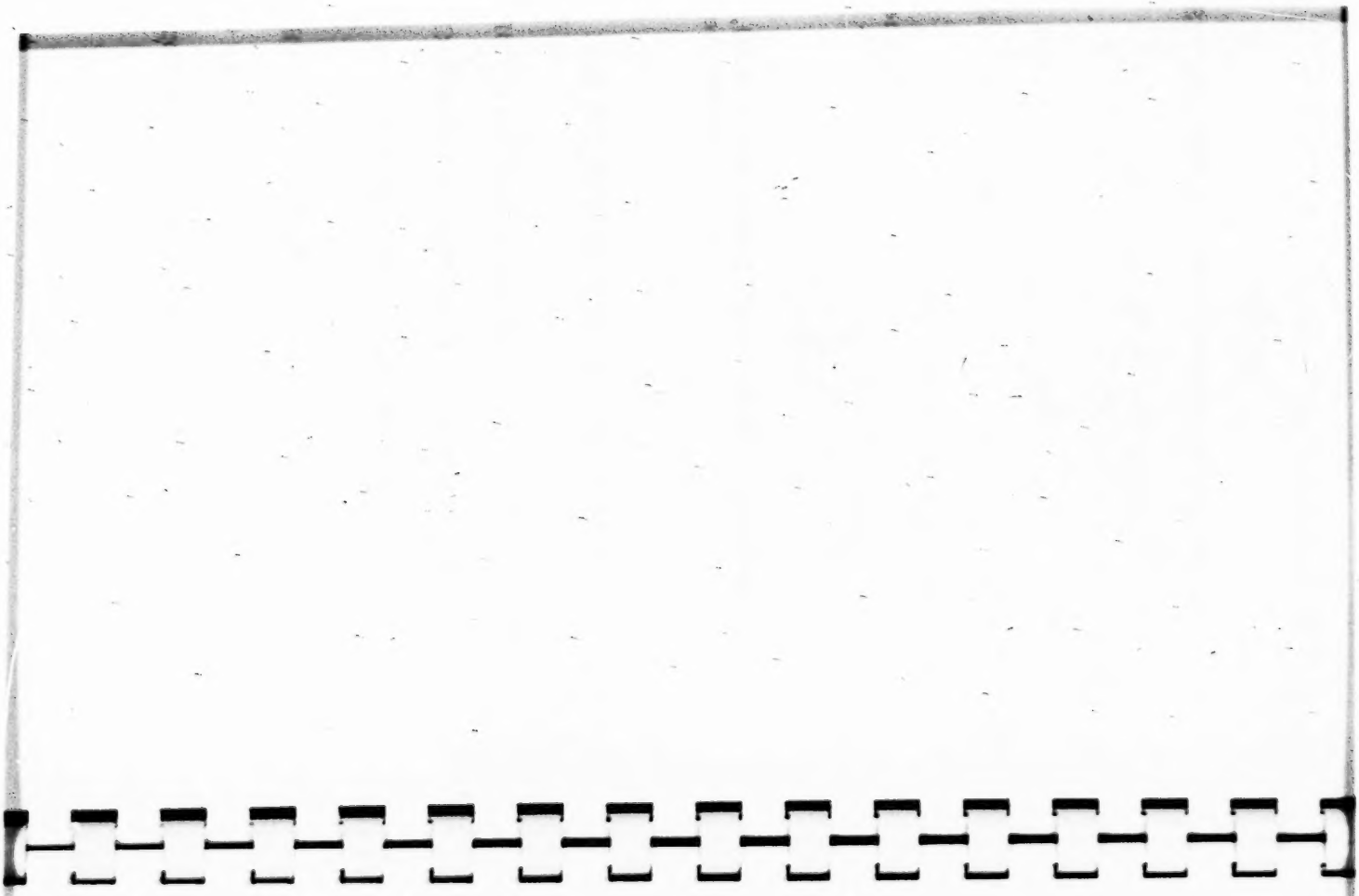
The petitioner, THE STATE OF TEXAS, prays that a writ of certiorari to review the opinion and judgment of the Court of Civil Appeals



for the Ninth Supreme Judicial District of Texas, at Beaumont rendered in these proceedings on December 13, 1973 and revised January 17, 1974. The Supreme Court of Texas denied Petitioner's application for a writ of error on April 17, 1974 and on May 29, 1974 denied petitioner's motion for rehearing.

OPINIONS BELOW

The opinion of the Court of Civil Appeals in and for the Ninth Supreme Judicial District of Texas, a Beaumont, Texas, appears at Appendix A, infra, pp. 1-20. The orders of the Supreme Court of the State of Texas refusing petitioner's application for writ of error and overruling the petitioner's motion for rehearing appear at Appendix B, infra, p. 21.

JURISDICTION

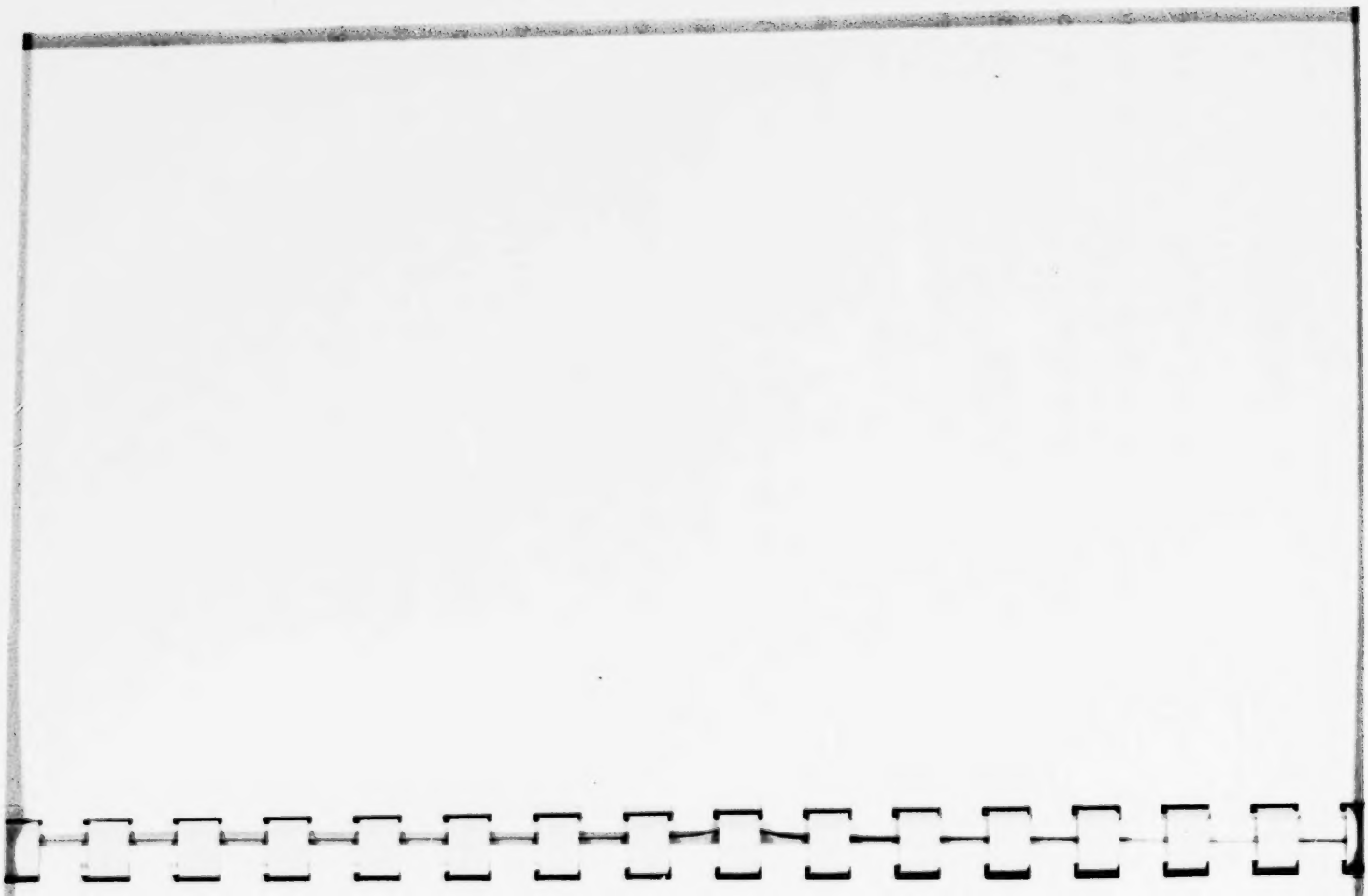
The order of the Supreme Court of the State of Texas was entered on May 29, 1974. See Appendix B, p. 21 infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The Criminal District Attorney of Jefferson County, Texas brought suit under Article 2338-1, Vernon's Annotated Texas Statutes to have the defendant, Daniel Landry, declared a delinquent child. The questions thereby presented for review are:

1. Where the defendant, Daniel Landry, through his attorney "affirmed" (plead guilty) to the misdemeanor charges against him, was it necessary for the State to present sworn testimony as to the defendant's guilt?

2. Where defendant's counsel stated that the defendant had his rights explained to him quite fully by counsel and that he took no issue with the facts; that he desired to affirm the charges, did this affirmation through counsel suffice as a waiver of the 5th Amendment privilege against self-incrimination in view of the fact that the court had asked



counsel whether he had explained to the defendant his right to remain silent and his right to have a jury determine whether or not he was guilty?

3. Was it necessary for the court in this case to explain the defendant's right to him personally, since the defendant was only charged with a misdemeanor where the record affirmatively shows that counsel had already told the court that he had explained the rights to the defendant?

4. Where the defendant's rights had been explained to him by counsel, does Federal Criminal Rule 11 necessitate an inquiry by the court personally where the defendant desires to affirm the charges against him by pleading guilty?

5. Can a juvenile waive his rights? Alone? Through counsel? Through counsel and guardian ad litem?

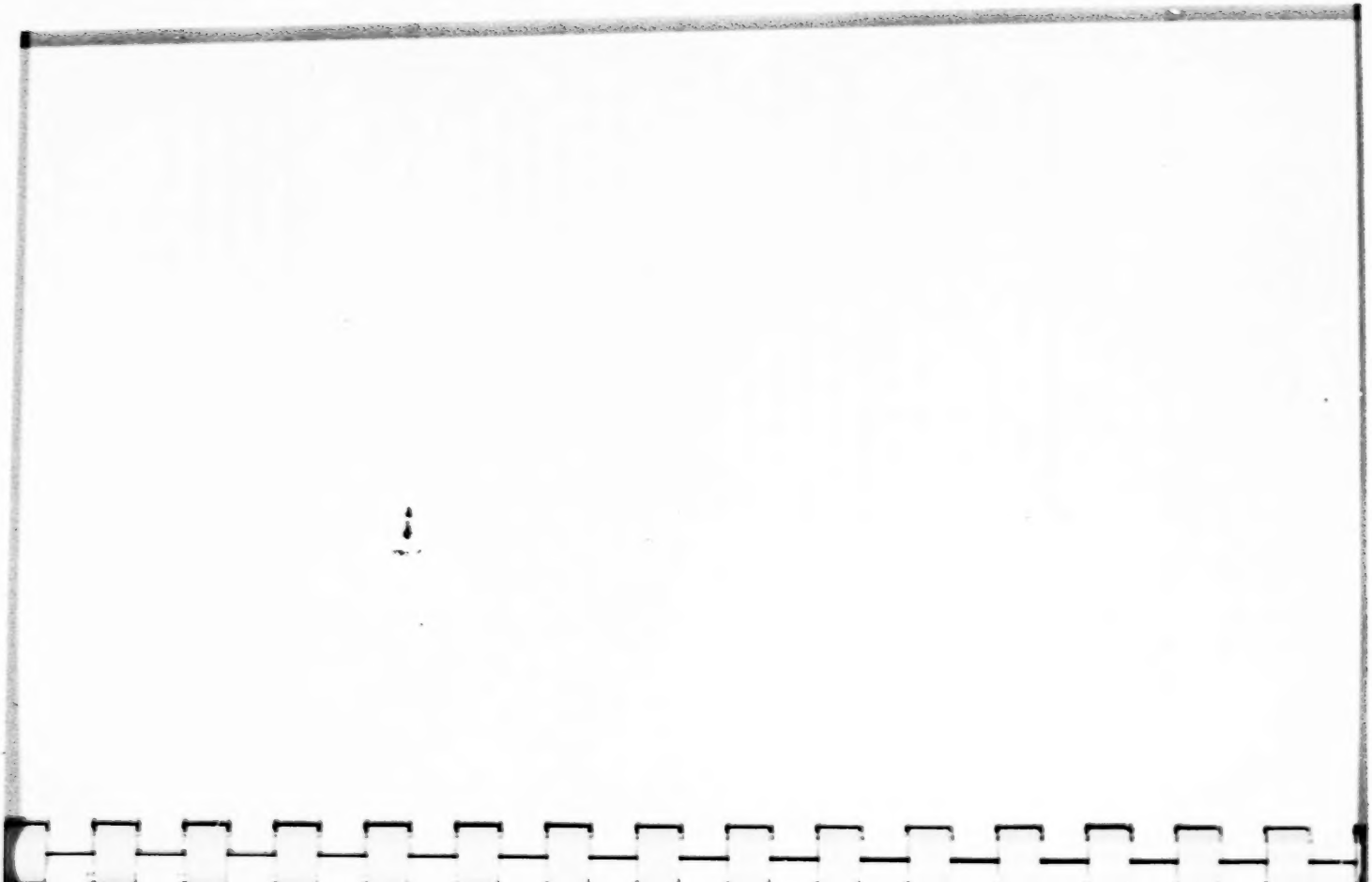
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Criminal Rule 11 reads as follows:

> "A defendant may plead not guilty or, with the consent of the court, nolo contendre. The court may refuse to accept the plea of guilty and shall not accept such plea or a plea of nolo contendre without first addressing the defendant personally and determining that the plea is made voluntarily with the understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept the plea of guilty, or if a defendant corporation fails to appear the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is factual basis for the plea."

The 5th Amendment to the United States Constitution states as follows:

> "No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or an indictment of a grand jury, accept in cases



arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The 14th Amendment to the United States Constitution, Section I, states as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Article 27.14 of the Texas Code of Criminal Procedure states:

"A plea of 'guilty' or a plea of

'nolo contendre' in a misdemeanor case may be made either by the defendant or his counsel in open court; in such case, the defendant or his counsel may waive a jury, and the punishment may be assessed by the court either upon or without evidence, at the discretion of the court. In a misdemeanor case arising out of a moving traffic violation for which the maximum possible punishment is by fine only, payment of a fine, or an amount accepted by the court constitutes a finding of guilty in open court, as though a plea of nolo contendre had been entered by the defendant."

STATEMENT OF FACTS

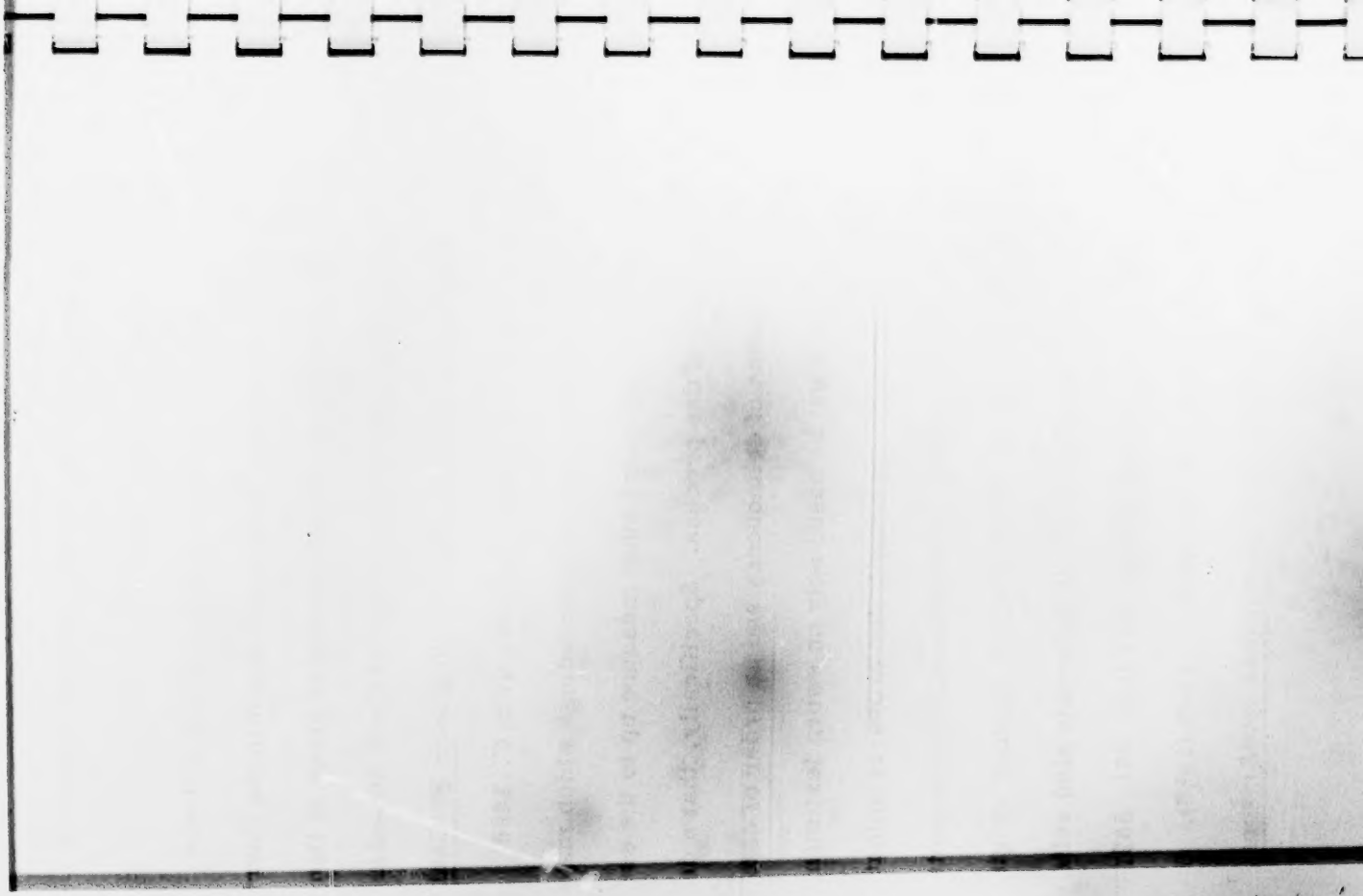
Daniel Landry, a juvenile, was charged with carrying a prohibited weapon, a misdemeanor, on March 26, 1973. On June 27, 1973, the Juvenile Court of Jefferson County committed him to the custody of the Texas Youth Council. Carrying a prohibited weapon is a misdemeanor criminal offense under the laws of the State of Texas. When the juvenile's case was called for trial the court asked the juvenile's attorney if he explained to Daniel Landry his rights, "that he doesn't have to say anything in court, that he may have a jury to determine whether or not he was guilty of carrying a prohibited weapon and to determine whether or not he was a juvenile delinquent." Counsel for the juvenile stated that he had explained this quite fully to the defendant and to the defendant's mother. Counsel further stated that they (Daniel and his mother) take no issue of the fact whatsoever, that Daniel

did have in his possession a pistol. The court then asked counsel if the defendant wished to affirm the allegations in the petition and counsel replied, "yes sir, Judge." The court then asked the juvenile if he had anything by way of explanation as to why he committed this particular offense. After a discussion with the juvenile which is set out in the opinion of the Court of Civil Appeals the Court found that Daniel Landry was a juvenile delinquent and sentenced him to commitment in the Texas Youth Council until released by the Texas Youth Council or until he turned 18, whichever occurred first.

Under Texas Procedure an adult charged with the same offense may plead guilty to the charge and such plea of guilty assumes all facts necessary for conviction. There is no statutory authority for determining the voluntariness of a misdemeanor plea if an adult would have been so charged and the Juvenile Code of Texas does not

require questioning by the Judge to determine the voluntariness of the plea.

The federal question of due process and fair treatment were first raised in the Court of Civil Appeals as assignments of error in Daniel Landry's brief to the Court of Civil Appeals. The Court of Civil Appeals relying on In Re Gault, 387 U.S. 1, 18 L. Ed. 2nd 527, 87 S.C. 1428 (1967) held that juvenile proceedings which may lead to commitment must measure up to the essentials of due process. Specifically, that a determination of delinquency and an order of commitment must be based only on sworn testimony subjected to the opportunity for cross-examination in accordance with Constitutional requirements. See page 3 of the Court of Civil Appeals' original opinion. The Court of Civil Appeals also relied on Kent vs. United States, 387 U.S. 541, 562, 16 L. Ed. 2nd 84, 97-98, 86 S.C. 1045 (1966). The Court further relied on Miranda vs. Arizona,



384 U.S. 436, 444 16 L. Ed. 2nd 694, 707, 86 S. C. 1602 (1966), and also Brady vs. United States, 397 U.S. 742, 25 L. Ed. 2nd 747, 90 S. C. 1463 (1970). The Court then entertained questions as to whether or not a child in fact could waive his constitutional rights and if he can waive those constitutional rights what factors should be considered. When the Court of Civil Appeals reached the question of the plea of guilty it cited Boykin vs. Alabana, 395 U.S. 238, 243, 23 L. Ed. 2nd 274, 279, 89 S. C. 1709 (1969). The Court of Civil Appeals further stated that Federal Criminal Rule 11 of the Federal Rules of Criminal Procedure made it mandatory upon the trial judge to interrogate the defendant personally and to make a record which was conclusively demonstrated as an intelligent waiver of his constitutional rights in entering a plea of guilty, citing McCarthey vs. United States, 394 U.S. 459, 22 L. Ed. 418, 89 S. C. 1166 (1969).

The Court of Civil Appeals then

concluded:

> "It is obvious, from the statement of the case found in the majority opinion, the juvenile was not so addressed . . . the juvenile did not waive his constitutional rights against self-incrimination."

The Court of Civil Appeals then concluded that since the right of self-incrimination was violated, the cause should be reversed and remanded for new trial and that the juvenile's plea of guilty or affirmation of the charge could not stand.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

It is the contention of the State of Texas that the defendant, Daniel Landry, was informed of his constitutional rights by his counsel and on a basis of this knowledge affirmed the charges and plead guilty to the charge of a misdemeanor offense of carrying a prohibited weapon. A plea of guilty after such knowledge constitutes a waiver of his rights of self-incrimination and presumes all facts necessary for his guilt. Albrecht v. State, 424 S.W. 2nd 447, (Cr. App. 1968). Federal Criminal Rule 11 was substantially complied with and the determination was made that this plea was, in fact, voluntary. The voluntary plea on the basis of the knowledge of the defendant's rights constitutes a waiver of any self-incrimination and, therefore, it is not necessary for the State of Texas to present any evidence on those facts already admitted by the defendant. It

should be noted that what is in issue in this case is primarily a question of waiver (i. e. how much knowledge is necessary for waiving or relinquishing a known right). It is very clear from counsel's remarks that the defendant not only knew what his rights were but that he and his mother both wished for him to affirm the charges. Their only complaint at the time was the possible disposition of the juvenile to the Texas Youth Council. The Court of Civil Appeals, however, reversed this case and remanded it for a new trial on the basis that the waiver was not voluntary because Federal Criminal Rule 11 had not been substantially complied with. Also, the Court of Civil Appeals seemed to indicate that there was question in their mind as to whether or not the attorney alone could waive the right of the juvenile. But again from counsel's remarks it appears that he was simply speaking for his client and that his client and his client's mother wished to waive the right

against self-incrimination and plead guilty or affirm the charges against him. Under Texas Procedure it is not necessary for the State to present evidence in a misdemeanor case when a plea of guilty has been entered when the defendant knowingly waives his rights by pleading guilty to the charge after his rights have been explained to him. It is the position of the State that these rights were explained to Daniel Landry and that there is no requirement in Texas Procedure for the judge to personally examine the defendant in a misdemeanor case to determine whether or not he understands those rights. See Brown v. U.S. 182 F2d 933. It is believed by the State that Federal Criminal Rule 11 does not require the judge in a misdemeanor case to personally inquire of the defendant to see if he understands these rights. It is further the position of the State that in this particular case and under the facts and circumstances of this

particular case, Federal Criminal Rule 11 was substantially complied with and that a knowing and voluntary waiver had occurred. It should be noted also that Texas considers juvenile proceedings as civil proceedings but the State realizes the application of the rule as laid out by the Supreme Court in the Gault case. It must be remembered also that this was not a trial but simply a plea of guilty. The State further feels that the due process clause of the Constitution and its requirements were met in this case. The latest pronouncement from the Texas courts is a later Court of Civil Appeals opinion, Moreno v. State, 510 S. W. 2d 116, which states their views on this subject as follows:

> "The Texas courts have held that the single fact that a child falls within the age limits which the law classifies as a juvenile, does not prevent a waiver by the child of his constitutional rights (cites cases) . . . It is the totality of circumstances which must

be considered in determining whether a juvenile has intelligently waived his privileges against self-incrimination. . ."

CONCLUSION

It is respectfully requested that a Writ of Certiorari be issued to the Court of Civil Appeals for the Ninth Judicial District of Texas, at Beaumont.

Respectfully submitted,

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APPENDIX "A"

FILED
DEC 13 1973
ELIZABETH LEBLANC, Clerk
COURT OF CIVIL APPEALS
STATE OF TEXAS
BEAUMONT, TEXAS

NO. 7529

DAN LANDRY, A JUVENILE CHILD — APPELLANT

V.

THE STATE OF TEXAS — APPELLEE

Daniel Landry, a juvenile, was charged with carrying a prohibited weapon, a pistol, on March 26, 1973. On June 27, 1973, the Juvenile Court of Jefferson County committed him to the care, custody, and control of the Texas Youth Council, as authorized by Art. 5143d, V.A.C.S. From this order of commitment, the juvenile brings this appeal.

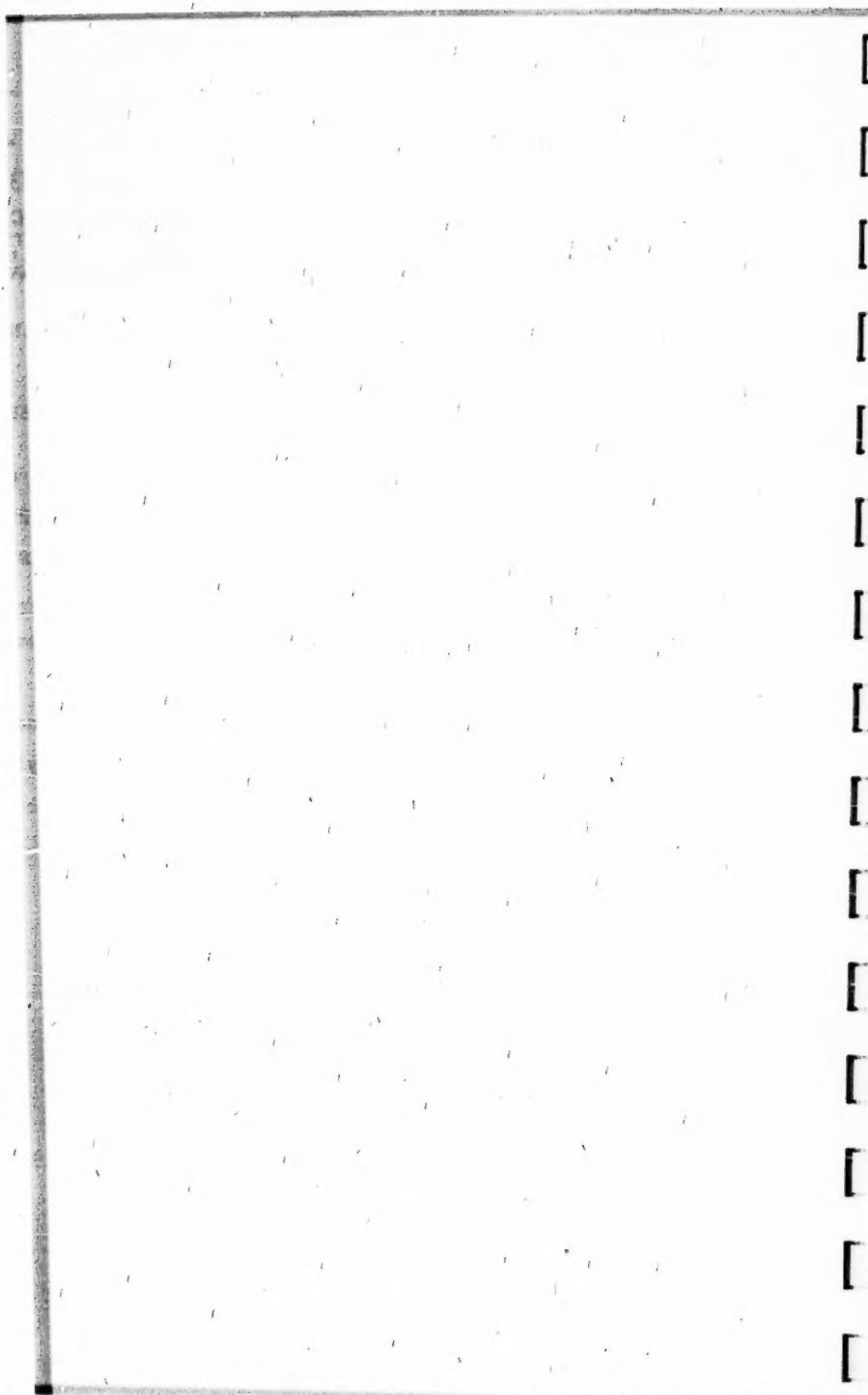
Among his points, the juvenile complains there was no sworn testimony at his trial proving the offense of carrying a prohibited weapon. We sustain this point and remand the cause for a new trial.

The following transpired at trial:

"BY THE COURT:

> "Okay, you may step down. All right, now, [court appointed counsel], have you explained to Daniel his rights in this matter, that he doesn't have to say anything in Court, today; that he may have a jury to determine whether or not he was guilty of carrying this prohibited weapon and to determine whether or not he was a juvenile delinquent?

[Revised in accordance with memorandum of January 17, 1974.]



"[COURT APPOINTED COUNSEL]:

"Judge, I've explained this quite fully to Daniel, and to Mrs. Landry. They take no issue of the fact, whatsoever, that Daniel did have in his possession a pistol. Uh, it's our understanding that the probation department has recommended in this case that the child be sent to the Texas Youth Council. He does not feel that is justified in this case; Mrs. Landry doesn't feel like it's justified. Daniel, himself says that he did not know it was against the law to carry a pistol around. He found the pistol in the house, in his home. It belonged to someone that was visiting in the home and he picked it up and carried it out. And --

"BY THE COURT:

"All right, . . . let's go ahead and take the adjudication stage and when we get to the disposition, we'll certainly be glad to hear more.

"[COURT APPOINTED COUNSEL]:

"All right.

"BY THE COURT:

"Now, he does wish to affirm the allegations in the petition?

"[COURT APPOINTED COUNSEL]:

"Yes, sir, Judge.

"BY THE COURT:

"By way of explanation, do you think--do you have anything you'd like to tell the Court, Daniel, at this time, by way of explanation of why you had this pistol?

"BY THE JUVENILE:

"A I thought it was a blow gun --

"Q You thought it was a what?

"A I thought it was a cap pistol.

"Q A cap pistol? Is that what you said?

"A I thought it was a blow gun.

"Q A blow gun?

"A Yes, sir."

In re Gault, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428 (1967), it was held that juvenile delinquency proceedings which may lead to commitment in a state institution must measure up to the essentials of due process and fair treatment. Specifically required are:

"(1) [W]ritten notice of the specific charge or factual allegations, given to the child and his parents or guardian sufficiently in advance of the hearing to permit preparation;

"(2) [N]otification to the child and his parents of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child;

"(3) [A]pplication of the constitutional privilege against self-incrimination; and

"(4) [A]bsent a valid confession, a determination of delinquency and an order of commitment based only on sworn testimony subjected to the opportunity for cross-examination in accordance with constitutional requirements."

See Bihms v. State, 491 S.W.2d 740 (Tex.Civ.App., Beaumont, 1973, no writ).

Here there is no sworn testimony to prove the offense of carrying a prohibited weapon as required by Gault, supra. These trials are not informal hearings, and the only way an appellate court can review the evidence to determine if the juvenile has been accorded his constitutional rights, is for the record to reveal completely the state's case.

The order of commitment is reversed and a new trial ordered. This cause was tried on June 27, 1973, before the effective date of Family Code, Title 3, relating to Delinquent Children and Children in Need of Supervision. Acts 63rd Leg., 1973, Ch. 544, p. 1460, effective September 1, 1973. The holding in the majority opinion and the views expressed in the concurring opinion were made in construing the statutes in effect at the time of the hearing and were not made with respect to the new statute which did not then govern the rights of the minor.

REVERSED and REMANDED.

Martin Dies, Jr.
Chief Justice

Opinion delivered
December 13, 1973

[Revised in accordance with memorandum of January 17, 1974.]

Concurring Opinion

I concur in the reversal of the judgment of the trial court and the remand of the cause; but, feeling that other serious questions are presented by this record, I add to the well-written opinion of our Chief Justice.

A fifteen-year-old boy was charged with being a delinquent child, the precise words used in the caption of the petition and order in this cause.[1/] He was charged with the violation of Art. 483, V.A.P.C.; and, had he been two years older, his maximum punishment would have been a fine of not less than $100 nor more than $500, or by confinement in jail not less than one month nor more than one year. Yet, he has been committed to the custody of the Texas Youth Council for more than six years. Art. 2338-1, § 3 (c) and Art. 5128, V.A.C.S. This has been done upon a record that so far transgresses constitutional rights that the judgment cannot withstand the mildest breeze emanating from the Constitution.

I need not apologize for writing at length on this case since I subscribe to the views of Justice Douglas, speaking for four justices: "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." Haley v. Ohio, 332 U.S. 596, 601, 92 L.Ed 224, 229, 68 S.Ct. 302 (1948).

1/ I have grave doubts as to the caption of the cause. Since the petition may be read to the jury which determines the ultimate question of delinquency, such may very well be prejudicial. See 10 Houston Law Rev. 721, 730 (1973).

All emphasis has been supplied unless otherwise indicated.

When the juvenile entered the court for the hearing, which in a very few minutes resulted in his incarceration for many years, he was cloaked in the presumption of innocence and protected by the full panoply of his constitutional rights, including those against self-incrimination. He could be convicted only by the state meeting its burden of proving the corpus delecti and his criminal agency beyond a reasonable doubt.[2/] As pointed out in the majority opinion, certain basic constitutional rights were guaranteed to juveniles In re Gault, 387 U.S. 1, 18 L.Ed 2d 527, 87 S.Ct. 1428 (1967).

A year earlier, the Court had determined that while juvenile hearings need not conform to all of the requirements of a criminal trial, the hearings must measure up to the essentials of due process. Kent v. United States, 383 U.S. 541, 562, 16 L.Ed.2d 84, 97-98, 86 S.Ct. 1045 (1966).

It is unnecessary to enter the judicial thicket of the civil-criminal dichotomy as applied to juvenile proceedings. Unquestionably, such proceedings are penal in nature. As Justice Johnson, now a member of our Supreme Court, said in Leach v. State, 428 S.W. 2d 817, 822 (Tex.Civ.App., Houston--14th Dist., 1968, no writ):

> "The delinquency statute is penal in its effect for the court may commit the child to a public institution until the child reaches the age of twenty-one years. The statute must be construed therefore,

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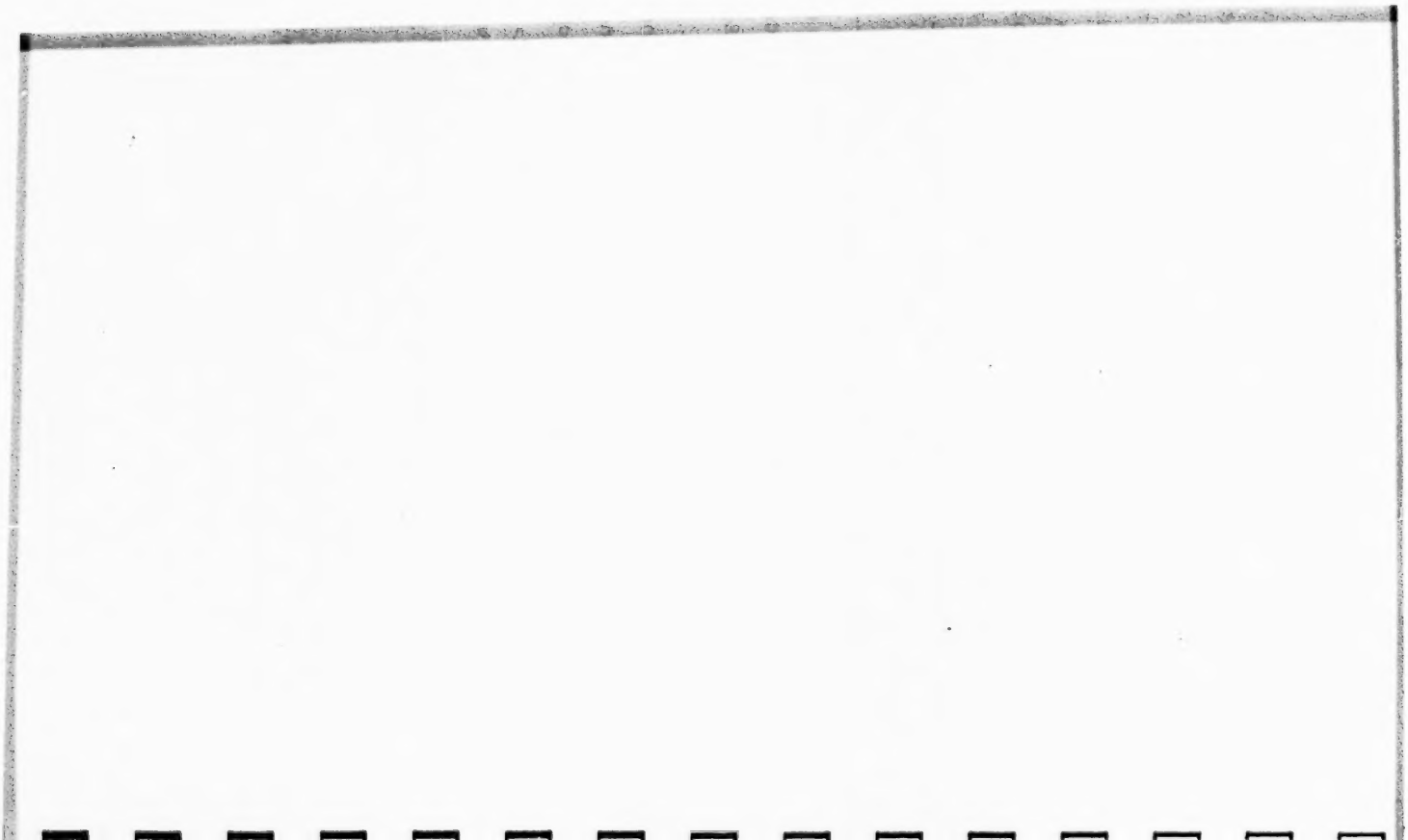
2/ Constitution of Texas, Art. 1, § 10; In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); Santana v. Texas, 397 U.S. 596, 25 L.Ed.2d 594, 90 S.Ct. 1350 (1970), reversing State v. Santana, 444 S.W.2d 614 (Tex. 1969).



in the same manner it would be construed under the penal code."

See also, In re Torres, 476 S.W.2d 883, 884 (Tex.Civ.App., El Paso, 1972, no writ).

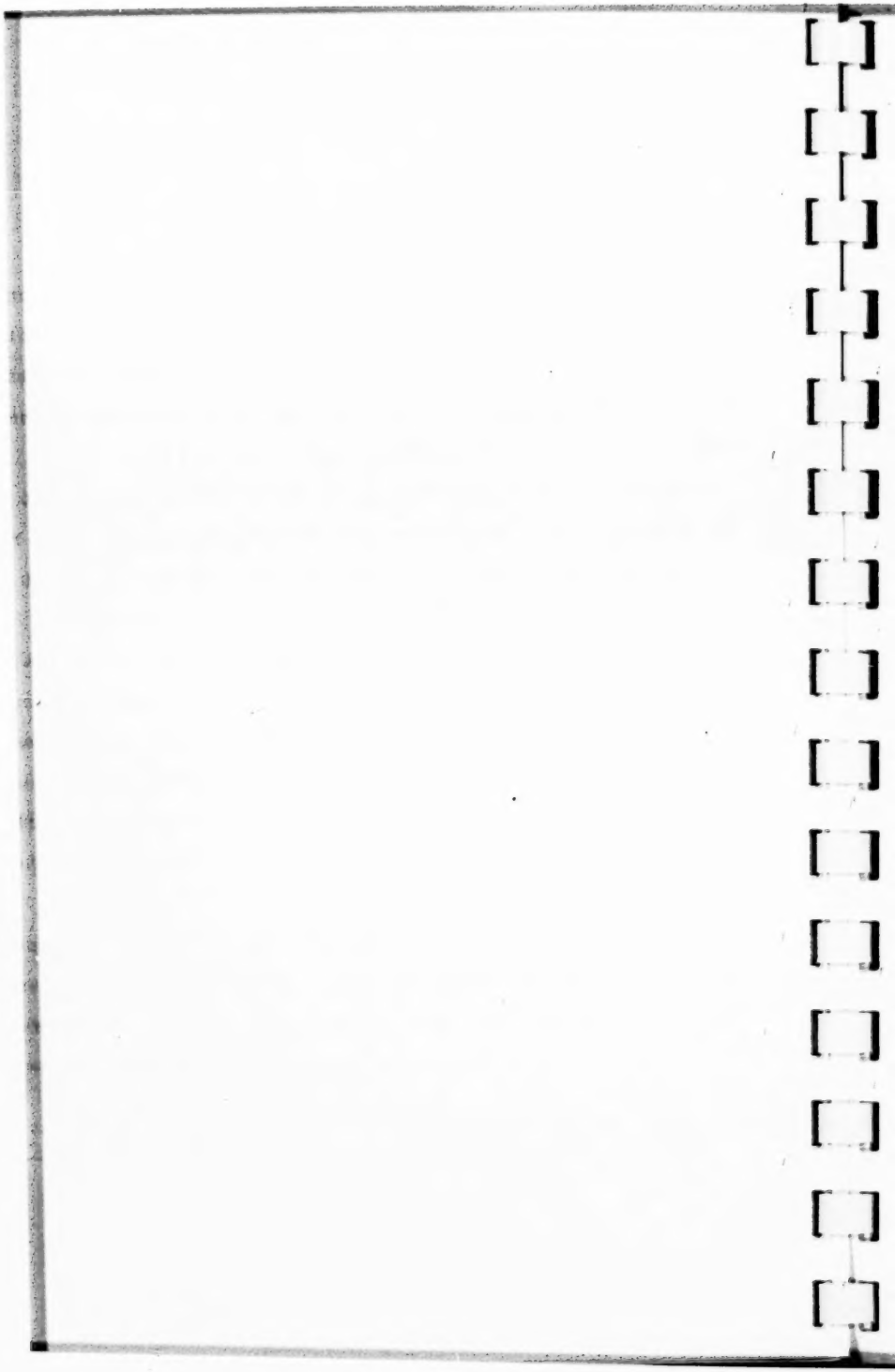
Among the fundamental constitutional rights conferred on juveniles by Gault was the privilege against self-incrimination. The Court pointedly noted: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." (387 U.S. at 47)

There is not a scintilla of evidence in our record that at the time and place in question the juvenile had a pistol in his possession, except the juvenile's qualified admission as set out in the majority opinion.[3/]

Our juvenile had not been confronted with any witnesses; no person had given any testimony that the juvenile did, in fact, have a pistol on or about his person. Thus, under Gault, "an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements." (387 U.S. at 57)

At that stage of the proceedings, the state had not discharged its burden of establishing the corpus delecti by any competent evidence. Instead, the trial judge called upon the defendant to give incriminating evidence against himself by asking counsel:

3/ Even this meager "testimony" was almost wholly exculpatory in nature. Cf. 1 Branch's Ann.P.C. (2d ed 1956) § 98, p. 103.



"Now, he does wish to affirm the allegations in the petition?" and counsel's reply: "Yes, sir, Judge." Of course, all will agree that a person is not required to give evidence of an incriminating nature against himself; but, under proper safeguards, there may be a waiver of such privilege.

The prevailing general definition of waiver, in this sensitive area of federal constitutional rights, is that expressed by the United States Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019 (1938), "an intentional relinquishment or abandonment of a known right or privilege."

The roots of privilege, as was said by Justice Fortes in Gault, "has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion." (387 U.S. at 47) Before calling upon the juvenile to "affirm the allegations in the petition", the state had the burden of establishing a waiver of the right against self-incrimination. And, it must be shown that the waiver is made voluntarily, knowingly, and intelligently. Cf. Miranda v. Arizona, 384 U.S. 436, 444, 16 L.Ed.2d 694, 707, 86 S.Ct. 1602 (1966), involving extra-judicial confessions. See also, Brady v. United States, 397 U.S. 742, 25 L.Ed.2d 747, 90 S.Ct. 1463 (1970), relating to acceptance of plea of guilt.

When we come to consider waiver by a juvenile, several interesting questions arise: Can a child in fact waive his constitutional rights? If he can, what factors should be considered?

Can someone other than the child waive the child's rights? If so, who may do so and what factors should be considered?[4/]

In Johnson v. Zerbst, supra, it was stated: "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" (304 U.S. 464)

Accepting the teachings of our own Supreme Court in Carrillo v. State, 480 S.W.2d 612, 615 (Tex. 1972), "that juvenile proceedings are . . . civil, not criminal, in nature", I have serious doubts that a minor can waive anything in a judicial proceeding, much less his fundamental constitutional rights. As was said in Watson v. Glenn, 82 S.W.2d 704, 705 (Tex.Civ.App., Austin, 1935, no writ): "Minors being persons non sui juris cannot themselves waive any rights."

Following Justice Pope's eloquent dissent in Brenan v. Court of Civil Appeals, Fourteenth Dist., 444 S.W.2d 290, 294, et seq., (Tex. 1968), it is now settled in Texas that a guardian ad litem must be appointed for a juvenile charged with being a delinquent Starks v. State, 449 S.W.2d 559 (Tex.Civ.App., Eastland, 1969, error ref.).[5/]

4/ Although these questions were propounded by the author in 23 Baylor Law Rev. 467, 468 (1971), a definitive answer to our precise question is not to be found therein.

5/ Accord: Felder v. State, 463 S.W.2d 272 (Tex.Civ.App., Houston--14th Dist., 1971, error ref. n.r.e.); Premeaux v.

Our record shows that a guardian ad litem was appointed to represent the interest of the juvenile in this case; but it is completely silent as to his activities during the hearing. Even so, it is clear that a guardian ad litem cannot waive any rights of the minor. In Greathouse v. Fort Worth & Denver City Ry. Co., 65 S.W.2d 762, 765 (Tex.Com.App., 1933, holdings approved), the Court said:

> "The guardian ad litem or next friend can make no concessions nor can he waive or admit away any substantial rights of the minor, or consent to anything which may be prejudicial to him."

Or, as was said in Lowery v. Berry, 153 Tex. 411, 269 S.W. 2d 795, 797 (1954): "Neither the next friend nor the parent of a minor child is authorized to agree to a judgment which throws away its substantial rights." See also, 43 C.J.S., Infants § 113, pp. 303-305 (1945); 42 Am.Jur.2d, Infants § 184, pp. 169-170 (1969). Clearly, under these authorities, the guardian ad litem would have had no authority to waive the juvenile's rights against self-incrimination.

Under the leading authorities to be discussed hereinafter, counsel alone is not authorized to make the waiver of the constitutional rights. Yet, that is the only waiver of the privilege which we can find in this case.

State, 472 S.W.2d 795 (Tex.Civ.App., Beaumont, 1971, error ref n.r.e.); Barnley v. State, 473 S.W.2d 348 (Tex.Civ.App., Fort Worth, 1971, no writ); Boardman v. State, 473 S.W.2d 538 (Tex. Civ. App., Fort Worth, 1971, no writ).

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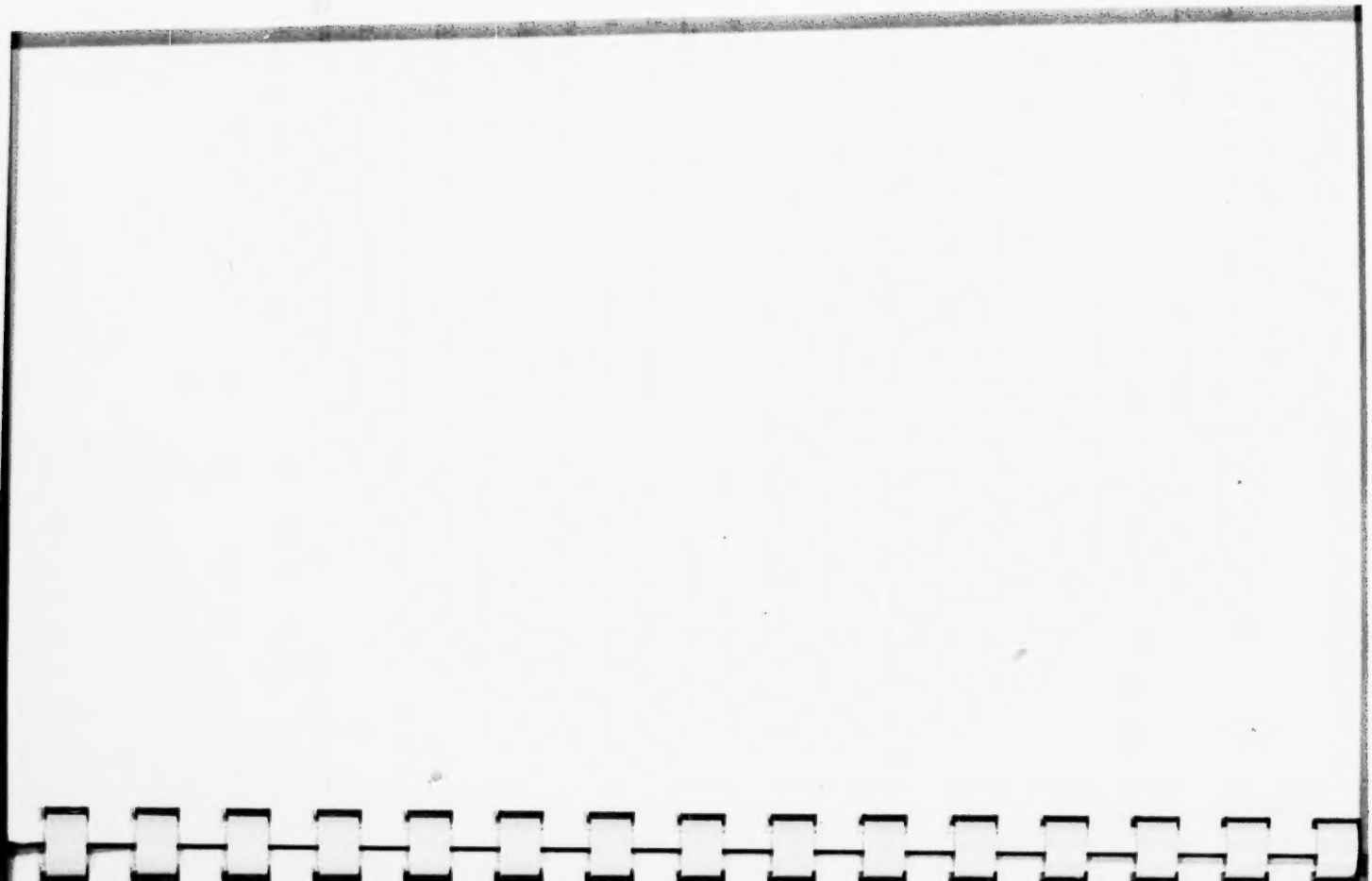
In essence, the juvenile in our case was called upon to ead guilty to the petition at a time when there was no compe- nt evidence before the court showing his guilt. In Boykin v abama, 395 U.S. 238, 243, 23 L.Ed.2d 274, 279, 89 S.Ct. 1709 969), Justice Douglas set out several rules which are applicable re:

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v Hogan, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489. Second, is the right to trial by jury. Duncan v Louisiana, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444. Third, is the right to confront one's accusers. Pointer v Texas, 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065. We cannot presume a waiver of these three important federal rights from a silent record."

By virtue of its supervisory authority over the lower federal urts, the Supreme Court had earlier held that amended Rule 11, deral Rules of Criminal Procedure, made it mandatory upon the ial judge to interrogate the defendant personally, and to make record which conclusively demonstrated an intelligent waiver of s constitutional rights in entering a plea of guilt. McCarthy United States, 394 U.S. 459, 22 L.Ed. 418, 89 S.Ct. 1166 (1969).

As pointed out by Justice Harlan in his dissent in Boykin v. abama, supra, "[W]hat is now in effect being held is that the ophylactic procedures of Criminal Rule 11 are substantially plicable to the States as a matter of federal constitutional e process." (395 U.S. at 247) Federal Criminal Rule 11 provides,



inter alia, that a plea of guilty may not be accepted "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea."

It is obvious, from the statement of the case found in the majority opinion, the juvenile was not so addressed. Consequently, it can be said without fear of contradiction: The juvenile did not waive his constitutional rights against self-incrimination.

Art. 1, § 10, Constitution of Texas, guarantees that a minor may not be required to give incriminating evidence against himself; yet, the same authority guarantees that he shall have the right of being heard by himself or counsel, or both. There must be a procedure which guarantees to the minor both of these rights to be exercised and claimed as it may appear to his best interest. Under the authorities previously noted, I am of the opinion that neither the minor or his guardian ad litem--acting alone or together--may waive his constitutional rights.

However, I am of the opinion that the trial court and the minor's attorney may do so under conditions which establish of record in the proceedings then being heard that the waiver is made voluntarily, knowingly, and intelligently. The trial judge should, by following the applicable provisions of Federal Criminal Rule 11,[6] supra, make certain that the minor--and not just the lawyer--understands such rights.

6/ Our statutory counterpart to Federal Rule 11 is Art. 26.13, V.A.C.C.P.

Competent counsel, having ascertained the facts of the case, in the exercise of his professional judgment and discretion must then determine which of the rights must be exercised--to remain silent or to testify. Counsel is not to be judged in his performance by hindsight but is bound to render reasonably effective assistance. Moore v. Beto, 458 F.2d 386 (5th Cir. 1972). Cf. Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). Counsel's performance, or lack thereof, may then be tested under the usual rules relating to effectiveness of appointed or retained counsel. Steel v. State, 453 S.W.2d 486 (Tex.Crim.App. 1970); Johnson v. State, 478 S.W.2d 954 (Tex.Crim.App. 1972). But, cf. Ex parte Stauts, 482 S.W.2d 638 (Tex.Crim.App. 1972).

With a trial court fully attuned to the constitutional and statutory rights of a minor who is represented by competent counsel, due process will be achieved. The rights of the minor will be protected and those of society preserved. With anything less, the rights of both will be sacrificed.

There is still another reason why the judgment of the trial court must be reversed. It is clear that hearsay evidence entered into the rendition of the judgment. Our dissenting brother has a lengthy discussion of the material found in the "Analysis of the Factors" signed by the assistant probation officer. Every statement made therein is hearsay--no witness having given testimony as to any of such alleged "facts" found.

Although we have what is designated as a complete statement of facts, it does not contain any report of the probation officer. Indeed, there is no evidence from any source of our juvenile's prior criminal activities (or lack thereof) to be found in the record. I agree with my dissenting brother that the trial judge had this report before him "while considering the disposition of this matter." A comparison of this "juvenile material" with the remarks shows clearly that such material formed the basis of the remarks. Thus, our record is the converse of that found In re Brown, 201 S.W.2d 844, 847 (Tex.Civ.App., Waco, 1947, error ref. n.r.e.).

The consideration of the hearsay evidence found in the juvenile records falls within the prohibition set out in Ballard v. State, 192 S.W.2d 329, 332 (Tex.Civ.App., Amarillo, 1946, no writ).

It has long been the settled rule in this state that hearsay is incompetent to establish any fact and can never form the basis of a finding of fact or of the judgment of the court, whether it is objected to or not. Texas Co. v. Lee, 138 Tex. 167, 157 S.W.2d 628, 631 (1941). See also, Aetna Insurance Company v. Klein, 160 Tex. 61, 325 S.W.2d 376, 381 (1959); Way v. Fisher, 425 S.W.2d 704, 705 (Tex.Civ.App., Houston--14th Dist., 1968, no writ); Sampson v. Apco Oil Corporation, 476 S.W.2d 430, 431 (Tex.Civ.App., Amarillo, 1972, no writ).

The trial court was not authorized to consider the hearsay evidence contained in the report of the juvenile department.

Cf. Bihms v. State, 491 S.W.2d 740, 743 (Tex.Civ.App., Beaumont, 1973, no writ). In giving weight to such evidence--and I repeat, it is quite evident from the colloquy between the trial judge and the other participants in the hearing that such was done--the trial court abused the discretion confided to it by the statute.

I need not comment on the juvenile's fourth point complaining of being deprived of effective assistance of counsel. From what has been said, it is apparent that this point has merit.

Quentin Keith
Associate Justice

December 13, 1973

[Revised in accordance with memorandum of January 17, 1974.]

Dissenting Opinion

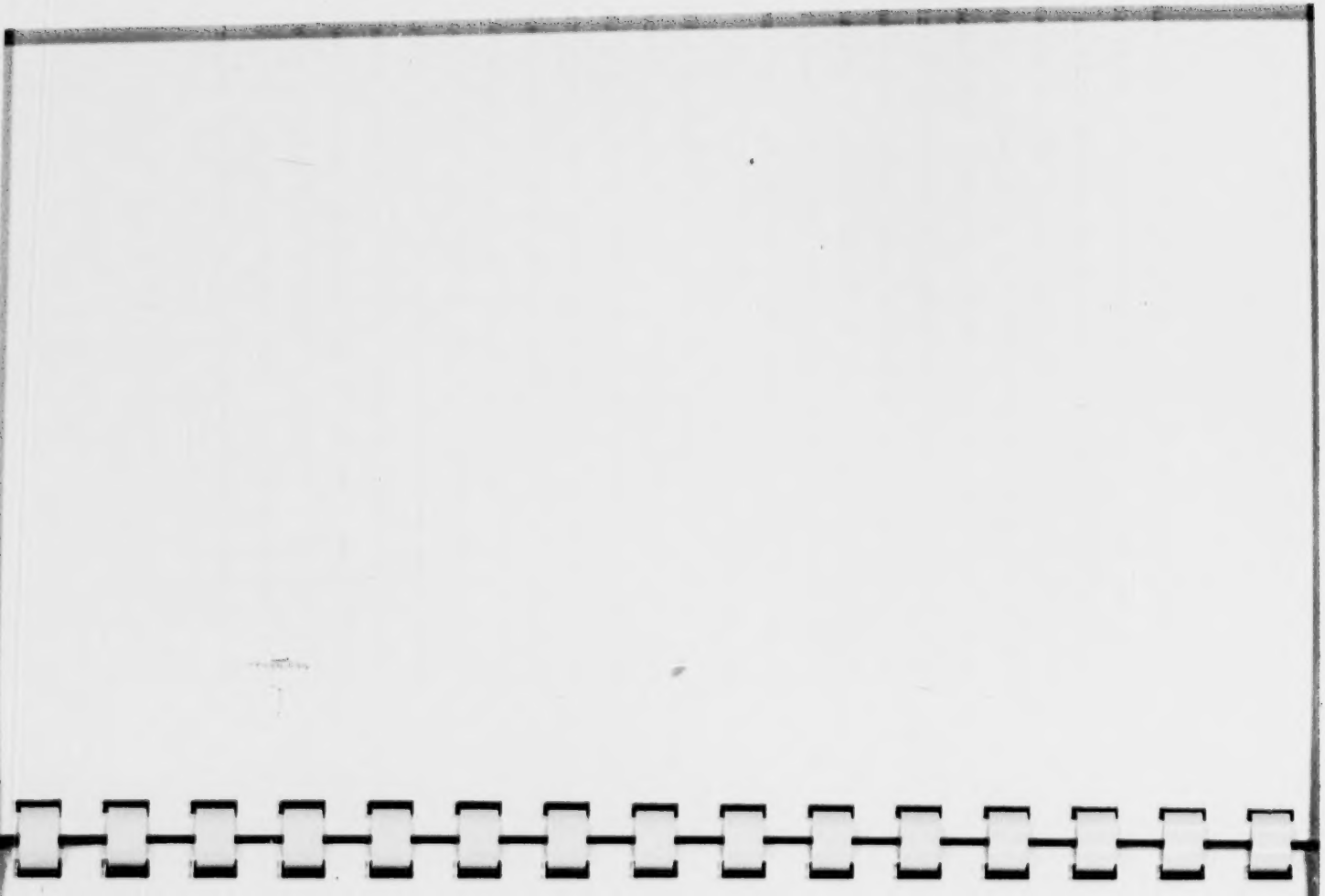
I respectfully disagree. I would affirm the judgment of the trial court and leave Daniel Landry in the custody of the Texas Youth Council.

I view this case as one in which a fifteen-year-old boy was given the protection that he and all juveniles are entitled to under the law. The Juvenile Court first appointed a guardian ad litem to represent him, and no complaint is made of that appointment. The court then appointed an attorney to represent him; and, although there is a point of error that the trial court failed to provide effective assistance, there is nothing in the record to indicate such attorney did not have sufficient experience and ability to represent Daniel Landry in this matter.

The record shows his mother was present, and in fact testified. Written notice was given of the charge against this boy, and no complaint is made about the sufficiency of the notice before the trial court heard this matter. No complaint is made about the sufficiency of the warning given to this boy by his attorney, before that attorney announced in open court that Daniel Landry did have a pistol in his possession. No assertion is made here that Daniel Landry was not in possession of a pistol when apprehended, and this was the only issue before the Juvenile Court. The record shows he was born February 4, 1958, and therefore the Juvenile Court had jurisdiction to hear the case.

The contest in the trial court, if there was one, was only that Daniel Landry and his mother wanted the trial court to place him on probation. The only explanation given by the mother to the court as to why Daniel Landry had the gun was that if a daughter, Janet Landry, had not brought it in the house, "He wouldn't have had none to pick up." The discourse given by the trial court in considering disposition of this case shows that Daniel Landry's juvenile record consisting of three pages (dating from 1967 to the present time), prepared by Mr. Boehm, was before him and that Daniel had already been to Gatesville three times and had gotten out the last time on a technicality.

A copy of an "Analysis of the Factors" signed by Anthony J. Boehm, Assistant Probation Officer, Jefferson County Probation Services, was filed in this court. There is no showing that such report was filed in the trial court, although from the things said by the trial judge in open court, which are a part of our record, undoubtedly this is the report he had before him while considering the disposition of this matter. Such report shows Daniel Landry's mother has had to rear thirteen children by herself since her husband died in 1963, eight of whom have been committed to the Texas Youth Council. The three pages of the record of Daniel Landry, referred to by the court, beginning June 10, 1967 through August 23, 1972, shows these charges: malicious mischief, destruction of property,



cursing and vulgar signs, theft of a BB gun, nuisance, theft of grain, theft of a bicycle, pointing a gun at some kids, beating up kids, shoplifting, theft of rods and reels, attempted burglary, assault, aggravated assault (threw a knife at kids), stealing bicycle tires and lawnmower, numerous burglaries and thefts.

Homer E. Stephenson
Associate Justice

December 13, 1973

FILED
JAN 17 1974
ELIZABETH LeBLANC, CLERK
COURT OF CIVIL APPEALS
9TH SUPREME JUDICIAL DIST.
BEAUMONT, TEXAS

NO. 7529

DAN LANDRY, A JUVENILE CHILD — APPELLANT

V.

THE STATE OF TEXAS — APPELLEE

Memorandum to the Clerk

You are directed to make the following changes in the opinion in this cause handed down on December 13, 1973:

1. All references to "Mr. Inman" will be deleted and the bracketed words "Court appointed counsel" will be substituted in lieu thereof.

2. On page 4 of the opinion, immediately preceding the last paragraph, you will insert a paragraph reading as follows:

> This cause was tried on June 27, 1973, before the effective date of Family Code, Title 3, relating to Delinquent Children and Children in Need of Supervision. Acts 63rd Leg., 1973, Ch. 544, p. 1460, effective September 1, 1973. The holding in the majority opinion and the views expressed in the concurring opinion were made in construing the statutes in effect at the time of the hearing and were not made with respect to the new statute which did not then govern the rights of the minor.

3. The last paragraph of the concurring opinion of Associate Justice Keith will be deleted.

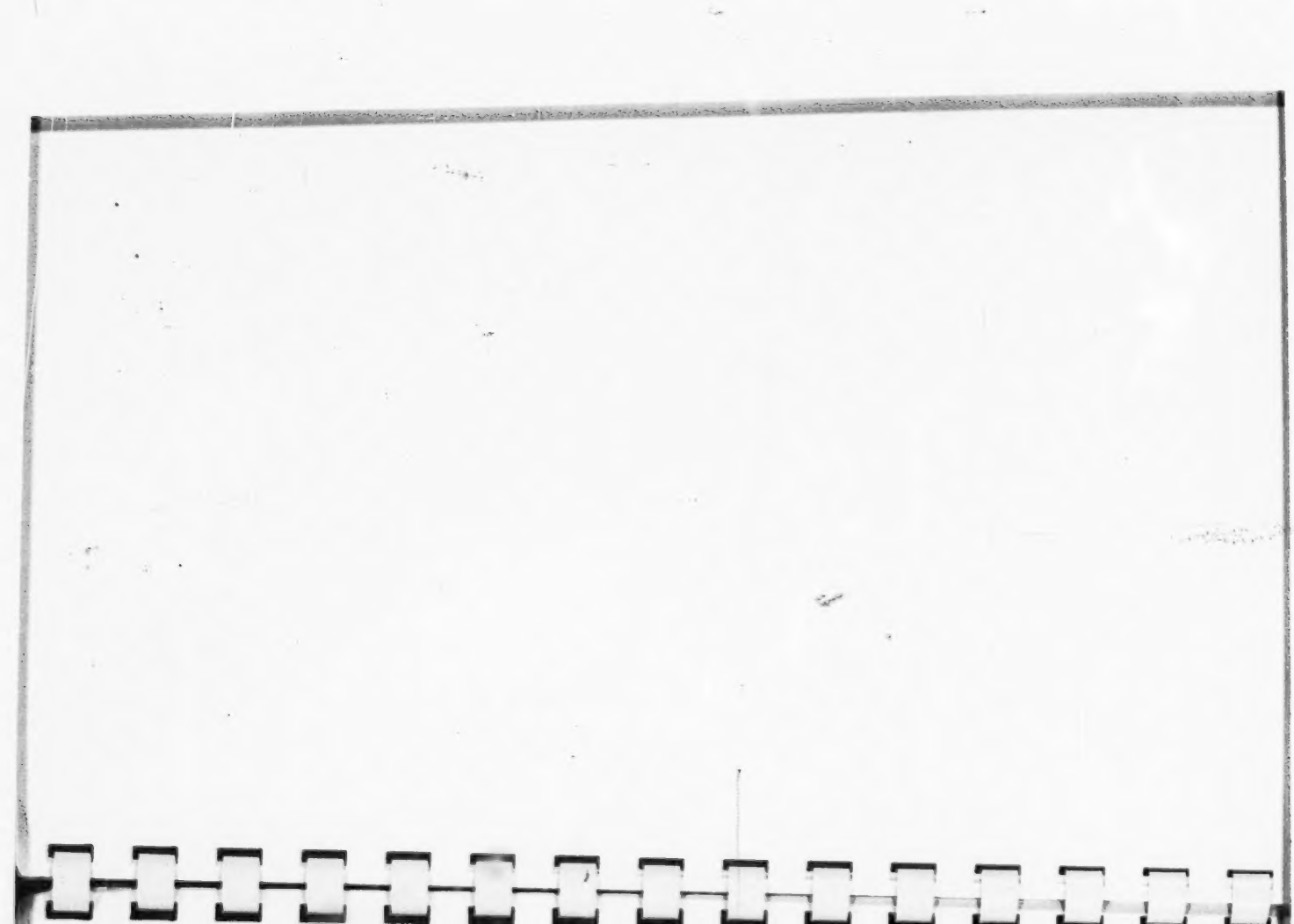
Appellee's motion for rehearing is overruled.

You will make the appropriate changes in the opinion and notify all counsel of this action by sending a copy of this order to such attorneys.

PER CURIAM

January 17, 1974

APPENDIX "B"



IN THE SUPREME COURT OF TEXAS

April 17, 1974

No. B-4491

STATE OF TEXAS

vs.

DANIEL LANDRY, A DELINQUENT CHILD

From JEFFERSON County,

NINTH District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, the State of Texas, pay all costs incurred on this application.

.....

May 29, 1974

No. B-4491

STATE OF TEXAS

vs.

DANIEL LANDRY, A DELINQUENT CHILD

From JEFFERSON County,

NINTH District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 14th day of June, 1974.

GARSON R. JACKSON, Clerk

By Mary M. Wakefield Deputy

Mary M. Wakefield

No. B-4491

IN THE SUPREME COURT OF TEXAS

- - - - -

STATE OF TEXAS

vs.

DANIEL LANDRY, A DELINQUENT CHILD

- - - - -

Certified copy of Order of the Supreme Court of Texas. (Application for Writ of Error REFUSED—N. R. E.)

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CERTIORARI DENIED